

**United States Department of Labor
Employees' Compensation Appeals Board**

S.E., Appellant

and

**U.S. POSTAL SERVICE, HOBOKEN MAIN
POST OFFICE, Hoboken, NJ, Employer**

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**Docket No. 21-0699
Issued: May 20, 2022**

Appearances:

James D. Muirhead, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 22, 2021 appellant, through counsel, filed a timely appeal from a January 28, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury in the performance of duty on January 6, 2020, as alleged.

FACTUAL HISTORY

On January 7, 2020 appellant, then a 55-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that at 1:30 p.m. on January 6, 2020 she “tripped on steps going to bank with money to get change for [the employing establishment]” and sustained knee injuries while in the performance of duty. She stopped work on January 7, 2020. On the reverse side of the claim form B.J., supervisor customer services, disputed that appellant was in the performance of duty explaining that, at the time of the incident, she was not authorized to be at that location or perform the alleged work activity.

The record reflects that on January 6, 2020 the employing establishment executed an authorization for examination and/or treatment (Form CA-16) authorizing appellant to seek medical care related to her lower leg “[c]ontusion-[b]ruise with [s]kin intact.”

In a January 8, 2020 statement, Supervisor B.J. explained that on January 6, 2020 at 2:00 p.m. appellant returned to the Main Office to end her tour after completing cleaning three stations. When she returned to the workroom floor, appellant informed S.C., a supervisor, that she had tripped and fallen while obtaining change for the Westside Station at the bank. B.J. indicated that this was not the normal process by which the employing establishment received change for the retail window. He also noted that as appellant did not inform any supervisor at the time of the alleged incident, no one was able to report to an “accident scene.” B.J. noted that, the following day he went to the bank and the bank teller indicated that there had been no report of a person falling on their property the day prior. A photograph of the bank’s front entrance was attached, which B.J. noted showed that there were no obvious tripping hazards and that the bank had no steps at its entrance.

In a January 10, 2020 development letter, OWCP advised appellant of the deficiencies in her claim and instructed her as to the factual and medical evidence necessary to establish her claim. It provided a factual questionnaire for her completion and afforded her 30 days to respond.

In a January 18, 2020 statement, appellant indicated that on January 6, 2020 between 1:15 to 1:30 p.m. she drove to the bank to obtain change for the employing establishment. She indicated that, in addition to her custodian duties, she had been performing that job duty for over 15 years for the three employing establishment stations in Hoboken, N.J. Appellant indicated that she had double parked and accessed the bank through the back entrance, which had two stairs. She attached photographs of the back entrance to the bank, which she also noted had two cameras. Appellant indicated that she tripped on the final step and fell on both knees before reaching the bank entrance. She noted that a woman, who saw her on the floor crying and not able to stand on her own, assisted her in getting up and going back to her car. Appellant indicated that she drove to the Westside Station, dropped off the change, and told postal worker “A” that she had fallen and was in pain. She then returned to the Main Office about 1:35 p.m. to clock out. Appellant saw Acting Supervisor J.M. as she was walking towards the staircase leading to the lunchroom to pick up her

belongings. She indicated that she never made it up the stairs to the retrieve her personal belongings as she could not bend her left knee. Rather, S., a coworker who was on break, retrieved her purse for her. Appellant indicated that her left knee felt swollen and was throbbing. She indicated that Supervisor S.C. provided a chair for her and that both supervisor's J.M. and S.C. stayed with her until an ambulance arrived. Appellant indicated that Supervisor B.J. saw her when she was being strapped to the gurney. She noted that she had a prior work-related injury to her left knee in March 2016, which OWCP had denied.

Medical reports from Dr. Richard A. Boirado, a Board-certified orthopedic surgeon, were received. In a January 14, 2020 medical report, Dr. Boiardo diagnosed post-traumatic osteoarthritis of both knees, left worse than right. He noted the history of injury as appellant falling entering a bank on January 6, 2020 while participating in a work activity. Dr. Boiardo noted that appellant had direct impact on both knees and experienced severe pain after returning to work. He noted that she was taken by ambulance to the emergency room, where she received x-rays and was discharged the same day. Dr. Boiardo also noted that appellant had a work-related injury to her left knee three years ago and that she continued with unresolved pain and used a cane despite having had microfracture surgery performed. He provided a January 14, 2020 work status note, a January 14, 2020 referral for magnetic resonance imaging (MRI) scan of both knees, and a January 29, 2020 Form CA-16, which diagnosed post-traumatic osteoarthritis of both knees.

By decision dated February 13, 2020, OWCP denied appellant's traumatic injury claim. It found that the incident occurred as alleged, however, the medical component of fact of injury was not established as the record did not contain a firm diagnosis in connection with the January 6, 2020 incident. OWCP further noted that appellant may not have been in the performance of duty when the incident occurred as she "may not have been performing [her] assigned duties." It added that she was required to "submit evidence to determine if [she was] in the performance of duty when the injury/condition occurred." OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On March 10, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held July 16, 2020. She testified that she worked for four employing establishment stations, that the window clerks always needed change, and that she would go to the bank to obtain change. Appellant advised her work hours were from 5:30 a.m. to 2:00 p.m. and on January 6, 2020 she was working overtime. She testified that "A," a clerk/person in charge in the Westside Station, had sent her to the bank to get change, which she obtained at the bank. Appellant denied having a bank account at the bank. She testified that her immediate supervisor, "G," and the other supervisor, B.J., knew that she and the other custodians went to the bank to obtain change for the employing establishment stations. Appellant testified that she fell about 1:15 p.m. on both knees and that a woman from the bank helped her get up and that she sat inside the bank for about five minutes. However, she got worried and left as she needed to clock out at 2:00 p.m. Appellant returned with the change to the Westside Station, told the clerk there that she was hurt, and then drove to the main office. She stated that she was in pain and was unable to walk up the stairs to pick up her things as something cracked in her left knee. Appellant was then taken by ambulance to the hospital. She advised that Dr. Boiardo recently performed knee surgery. Appellant denied use of a cane, but indicated that, prior to this incident, she would wear a knee brace when she could not handle the pain. She testified that on January 6, 2020 she had worn a knee brace.

Progress reports from Dr. Boiardo dated January 14, February 18 and 21, and March 6, 2020 were received along with February 10, 2020 MRI scans of appellant's left and right knees, and medical records pertaining to appellant's June 22, 2020 total left knee replacement.

By decision dated October 1, 2020, an OWCP hearing representative affirmed, as modified, OWCP's February 13, 2020 decision. The hearing representative modified the prior decision to find that the medical evidence of record was sufficient to establish fact of injury. He reviewed the medical reports from Dr. Boiardo and related that he had provided a medical diagnosis directly related to the established work injury of January 6, 2020, but had not given a reasoned opinion addressing causal relationship. The hearing representative further found that the claim remained denied as performance of duty had not been established. The hearing representative found that the employing establishment strongly refuted appellant's allegation that she was engaged in an authorized assignment when she fell at the bank while off the employing establishment's premises on January 6, 2020 and that she had not provided any independent evidence to corroborate her allegation, despite identifying numerous alleged witnesses who could potentially verify her account of the January 6, 2020 work assignment.

On November 25, 2020 appellant, through counsel, requested reconsideration.

In a November 4, 2020 statement, A.B., a worker at the Westside Station, indicated that on January 6, 2020 she was working alone at the Westside Station and needed change for her cash drawer. She related that appellant had been going to the bank for all employing establishment stations and these transactions were approved by "G," the supervisor." A.B. indicated that on January 6, 2020 appellant went on the usual run to the bank, but returned in pain. Appellant explained to her that she had fallen going inside the bank. A.B. further indicated that appellant's knees were bleeding and scraped up and that appellant wanted to go to the hospital because of her pain. She indicated that appellant then left the Westside Station.

Copies of appellant's June 25, 2020 left knee operative report, July 17, 2020 left knee x-rays August 7 and 28, 2020 left knee x-rays, February 10, 2020 MRI scan of the left and right knees were received along with January 15, February 21, March 6, and July 7, 2020 medical reports from Dr. Boiardo.

By decision dated January 28, 2021, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,⁵ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related

⁴ See *supra* note 2.

⁵ S.S., Docket No. 19-1815 (issued June 26, 2020); S.B., Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

to the employment injury.⁶ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁷

The phrase “sustained while in the performance of duty” has been interpreted by the Board to be the equivalent of the commonly founded prerequisite in workers’ compensation law of “arising out of and in the course of employment.”⁸ To arise in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be stated to be engaged in the master’s business; (2) at a place when he or she may reasonably be expected to be in connection with his or her employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.⁹ In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.¹⁰

The Board has recognized that an employee on travel status or a temporary-duty assignment or special mission for her employer is under the protection of FECA 24 hours a day with respect to any injury that results from activities incidental to such duties.¹¹ When any person in authority directs an employee to run some private errand or do some work outside his or her normal duties for the private benefit of the employer or superior, an injury in the course of that work is compensable.¹² An employee whose work entails travel away from the employer’s premises is held to be within the course of his or her employment continuously during the trip or special mission -- except when a distinct departure for a personal pursuit is shown. It is OWCP’s burden to show that such a deviation occurred.¹³

ANALYSIS

The Board finds that appellant has met her burden of proof to establish a traumatic incident in the performance of duty on January 6, 2020, as alleged.

⁶ *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *S.A.*, Docket No. 19-1221 (issued June 9, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *C.L.*, Docket No. 19-1985 (issued May 12, 2020); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Valerie C. Boward*, 50 ECAB 126 (1998).

⁹ *S.V.*, Docket No. 18-1299 (issued November 5, 2019); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Mary Keszler*, 38 ECAB 735, 739 (1987).

¹⁰ *See N.J.*, Docket No. 20-1148 (issued March 8, 2021); *see also Mark Love*, 52 ECAB 490 (2001).

¹¹ *R.B.*, Docket No. 19-1026 (issued January 14, 2020); *W.Y.*, Docket No. 09-2012 (issued July 16, 2010).

¹² *See N.J.*, *supra* note 10; *Joseph C. Grzesik*, Docket No. 03-1492 (issued February 5, 2004).

¹³ *Joseph Grzesik, id.*; *Michael J. Koll, Jr.*, 37 ECAB 340 (1986).

The evidence of record indicates that on January 6, 2020 appellant, a custodian, went to the bank to obtain change for the employing establishment's Westside Station when she tripped and fell, sustaining injuries to her knees. Appellant returned to the Westside Station with the change, notified A.B., the clerk-in-charge, that she had fallen and was in pain, and then returned to the main employing establishment station to clock out as her tour of duty ended at 2:00 p.m. OWCP denied appellant's traumatic injury claim, finding that there was a discrepancy between her statement and Supervisor B.J.'s statement on whether she was authorized to go to the bank to obtain change.

In a development letter dated January 10, 2020, OWCP notified appellant of the deficiencies in her claim. It requested additional factual and medical evidence in support of her claim and provided a questionnaire for her completion. The Board notes, in relevant part, that the questions inquired into whether appellant deviated from her assigned job for personal reasons as the injury occurred off premises. Appellant responded that for over 15 years she had performed the task of going to the bank to obtain change for all the stations she serviced and had testified that she did not have a bank account at the bank when she tripped and fell on January 6, 2020. Moreover, the statement from A.B., whom appellant indicated was the clerk-in-charge of the Westside Station on January 6, 2020, corroborated appellant's allegation that she had for some period of time been tasked with going to the bank to obtain change for all stations, and that she was tasked with that responsibility on January 6, 2020 for the Westside Station. Clerk A.B. also corroborated appellant's allegation that a supervisor, identified as "G" had approved those transactions. While Supervisor B.J.'s statement contested that appellant was on an authorized trip to the bank at the time of the incident, A.B.'s statement indicates that appellant was directed to go to the bank to obtain change on January 6, 2020 and had performed such duties for several years with knowledge from her immediate supervisor "G." Appellant, therefore, has established that she was on a special errand for the employing establishment and had not deviated from her duties for personal reasons.¹⁴

As it has been established that appellant was in the performance of duty at the time of injury, the medical evidence of record must be considered.¹⁵ OWCP has accepted that the incident occurred as alleged and that appellant sustained a diagnosed medical condition due to the accepted incident, on remand OWCP shall, therefore, further evaluate the medical evidence to determine the conditions to be accepted, if any, and whether appellant has established disability due to an accepted employment injury/condition. After any further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁶

¹⁴ See *N.J.*, Docket No. 20-1148 (issued March 8, 2021); *D.T.*, Docket No. 11-0751 (issued March 12, 2012).

¹⁵ *C.R.*, Docket No. 19-1721 (issued June 17, 2020).

¹⁶ *P.S.*, Docket No. 19-1818 (issued April 14, 2020).

CONCLUSION

The Board finds that appellant has met her burden of proof to establish a traumatic incident in the performance of duty on January 6, 2020, as alleged.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 20, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ The Board notes that the employing establishment issued a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. See 20 C.F.R. § 10.300(c); *S.P.*, Docket No. 19-1904 (issued September 2, 2020); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).